Supreme Court, U.S.
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No. 05- 051410

IN THE

Supreme Court of the United States

EMMA RODRIGUEZ,

Petitioner,

v.

PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, MARI CARMEN APONTE, MARCOS VILAR, MAIRYM RAMOS, & AIDA SANCHEZ,

Respondents,

UNITED STATES OF AMERICA,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) What level of sovereign immunity do U.S. territories possess to federal statutory liability?

(2) Does 48 U.S.C. § 734 ("The statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States.") give Puerto Rico sovereign immunity for claims arising outside Puerto Rico?

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OPINIONS BELOW

The opinion of the United State Court of Appeals for the District of Columbia Circuit is reported at *Rodriguez v. Puerto Rico Federal Affairs Admin.*, 435 F.3d 378 (D.C. Cir. 2006) (App. A). Upon accepting an interlocutory appeal from defendants, the Court of Appeals reversed the District of Columbia district court's September 30, 2004 decision which was reported at 338 F. Supp. 2d 125 (D.D.C. 2004) (App. B).

STATEMENT OF JURISDICTION

The Court of Appeals' opinion was rendered on February 3, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XI.

Suits Against States

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Title 48 United States Code, Section 734

Puerto Rico Federal Relations Act

> The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws other than those contained in the Philippine Trade Act of 1946 [22 U.S.C.A. § 1251 et seq.] or the Philippine Trade Agreement Revision Act of 1955 [22 U.S.C.A. § 1371 et seq.]: Provided, however, That after May 1, 1946, all taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and transported to the United States, or consumed in the island shall be covered into the Treasury of Puerto Rico.

STATEMENT OF THE CASE

Petitioner Rodriguez began working with the Respondent Puerto Rico Federal Affairs Administration ("PRFAA") as one of the "coordinators" of PRFAA's Voter Registration Project in New York City. The PRFAA is an executive agency of the Commonwealth of Puerto Rico ("Commonwealth") with offices in Washington, D.C. and New York. Individual respondents Aponte, Vilar, Ramos and Sanchez are supervisory employees of PRFAA, working in Washington, D.C. Plaintiff Rodriguez was a citizen of New York who worked for defendant in New York. Plaintiff Rodriguez was not paid overtime pay at the rate of time and one-half for her work as required by the Fair Labor Standards Act (FLSA). Ms. Rodriguez was terminated shortly after she complained to her superiors regarding the failure to properly pay her.

The Complaint alleging overtime, minimum wage and retaliation violations of the Fair Labor Standards Act ("FLSA") was filed on November 3, 2003 in the District of the District of Columbia. Puerto Rico moved to dismiss all claims under Fed. R. Civ. P. Rule 12(b)(1) claiming that the Commonwealth is entitled to sovereign immunity from suit based on a series of decisions in the First Circuit. The District Court for the District of Columbia found Puerto Rico did not possess constitutional "Eleventh Amendment" sovereign immunity. The Court of Appeals for the D.C. Circuit reversed, finding that Puerto Rico was immune from FLSA liability. The Court below held that 48 U.S.C. § 734 ("The statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States.") incorporates Eleventh Amendment sovereign immunity to Puerto Rico to the same degree as the states.

This Court last directly addressed territorial sovereign immunity in 1913. *People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913). Since that time, this Court's sovereign immunity jurisprudence has evolved, with significant decisions in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996), *Alden v. Maine*, 527 U.S. 706, 755 (1999), and *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62, 75-76 (2000). These decisions have defined the scope of Eleventh Amendment sovereign immunity for states to private citizen suits under federal statutes. The very recent decision in *Northern Insurance Company of New York v. Chatham County, Georgia*, __ U.S. __, 2006 WL 1071413 (U.S. 2006) has clarified that Eleventh Amendment sovereign immunity does not apply to entities other than states or arms of the state.

The Circuits have split on how to apply sovereign immunity to U.S. territories. The First Circuit finds that Puerto Rico is entitled to sovereign immunity directly under the Eleventh Amendment, the Ninth Circuit holds that the Commonwealth of the Northern Mariana Islands has no sovereign immunity to the FLSA, the D.C. Circuit below held that the Commonwealth of Puerto Rico has sovereign immunity to the FLSA, but under a statute it interpreted to require that Puerto Rico obtain the benefit of Eleventh Amendment sovereign immunity to the same degree as the states, even though it is not a state. 48 U.S.C. § 734.

This Court has clearly answered questions about the scope of sovereign immunity for States, subdivisions of States, and Indian tribes. Not so for the territories. Territorial sovereign immunity is an important area of sovereign immunity within the federal system remaining for this Court to address. The Circuits have not just split on the questions presented in this case, there is a compound fracture. There is significant confusion in the Courts of Appeals about the source and extent of sovereign immunity enjoyed by U.S. territories. The First, Ninth and D.C. Circuits have each come to a different conclusion as to how territories' sovereign immunity should be interpreted.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE NINTH CIRCUIT.

The D.C. Circuit found that the Commonwealth of Puerto Rico[1] possesses sovereign immunity from private suit under the FLSA to the same degree as the States by virtue of the general statutory applicability clause of the Federal Relations Act (FRA), 48 U.S.C. § 734 ("The statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States."). The Ninth Circuit held directly to the contrary with respect to the Commonwealth of the Northern Mariana Islands (CNMI). The CNMI has a general statutory applicability clause functionally the same as § 734, but the Ninth Circuit has ruled that this clause does not incorporate Eleventh Amendment sovereign immunity for the CNMI. *Fleming v. Department of Public Safety*, 837 F.2d 401, 405-6 (9th Cir. 1988); *Norita v. Commonwealth of the Northern Mariana Islands*, 331 F.3d 690, 693 (9th Cir. 2003). The language of that clause is no different in any relevant respect to the clause applicable to Puerto Rico.[2] The Ninth Circuit in *Norita*, *supra*,

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1. Puerto Rico is a "territory" of the United States. *See* 48 U.S.C. § 731 "Territory Included under Name Puerto Rico" *and see Harris v. Rosario*, 446 U.S. 651 (1980).

2. § 502 states that "laws of the United States shall generally be applicable to CNMI as they are applicable to the several states." *Norita*, 331 F.3d at 693. 48 U.S.C. § 1801. If anything, § 502 is broader, covering "laws" and not just "statutes," and by using the word "to" instead of "in" it clearly pertains to the Territory's liability as a party to litigation. For all purposes at issue here however, the clauses are the same.

held that the Commonwealth of the Northern Mariana Islands was not immune from FLSA liability as an employer, whereas the D.C. Circuit held that the Commonwealth of Puerto Rico is immune from FLSA liability as an employer. Thus the decision of the Court below conflicts with the Ninth Circuit Court of Appeals.

II. THE DECISION BELOW CONFLICTS WITH THE FIRST CIRCUIT.

The First Circuit has a long history of finding that Puerto Rico has Eleventh Amendment sovereign immunity with little or no explanation. In *Ramirez v. P.R. Fire Serv.*, 715 F.2d 694 (1983), for example, the First Circuit states "Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects." *See also Ezratty v. Puerto Rico*, 648 F.2d 770, 776 n.2 (1st Cir. 1981); *Slakin v. Puerto Rico*, 408 F.2d 682, 683 (1st Cir. 1969). The First Circuit continues to find Puerto Rico has Eleventh Amendment sovereign immunity. *Redondo Const. Corp. v. Puerto Rico Highway and Transp. Authority*, 357 F.3d 124, 125 n.1 (1st Cir. 2004); *See also Redondo-Borges v. U.S. Dept. of Housing and Urban Development*, 421 F.3d 1 (1st Cir. 2005); *Guillemard-Ginorio v. Contreras Gomez*, 161 Fed. Appx. 24 (1st Cir. 2005). As noted by the District Court below, the decisions in the First Circuit collectively offer no reasoning to support the decision to accord Puerto Rico Eleventh Amendment immunity.

The District Court below found that Puerto Rico does not possess constitutional sovereign immunity:

> What Congress giveth, Congress may take away, fully consistent with the Territory Clause of the Constitution: "The Congress shall have power to

> dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Constit. art. IV, § 3, cl. 2. *See also Harris*, 446 U.S. 651, 651-52, 100 S.Ct. 1929, 64 L.Ed.2d 587 (1980) (holding that under the Territory Clause, Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions"). There have been many changes since 1913 in Puerto Rico's status and the doctrine of sovereign immunity. However, defendants do not dispute the proposition that Congress has the power to abrogate any sovereign immunity that Puerto Rico may possess with regard to a Congressionally-created cause of action such as FLSA, and that it exercised that power when it amended the FLSA in 1974.

338 F. Supp. 2d at 128. The D.C. Circuit, in reversing, did not hold that Puerto Rico possesses Eleventh Amendment sovereign immunity, but effectively gave Puerto Rico immunity to the same degree afforded to states under § 734.[3]

The Circuit's decision below is in accord with the First Circuit's grant of immunity to Puerto Rico, however it effectively conflicts with the decisions in the First Circuit locating sovereign immunity for Puerto Rico directly in the

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3. The effect of this grant of sovereign immunity differs from what is afforded by the Eleventh Amendment directly, insofar as Eleventh Amendment immunity cannot be abrogated by Congressional action. However, the effect of the DC Circuit's decision turns FRA § 734 on its head: now instead of making U.S. statutes applicable to Puerto Rico automatically, Congress is required to state affirmatively that it intends to abrogate whatever sovereign immunity Puerto Rico may have.

Constitution. By finding the source of immunity to be conferred by Congress in FRA § 734, the Court below would seemingly permit Congress to abrogate the sovereign immunity of Puerto Rico. The First Circuit's locating Puerto Rico's sovereign immunity in the structure of the constitution (Eleventh Amendment immunity) would preclude Congress's ability to nullify Puerto Rico's immunity. *Alden v. Maine*, 527 U.S. 706, 755 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996).

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RECENT DECISION IN *NORTHERN INSURANCE COMPANY OF NEW YORK v. CHATHAM COUNTY, GEORGIA*.

This Court, in 1913 held that Puerto Rico has common law sovereign immunity in *People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913). Whether Puerto Rico had Eleventh Amendment immunity was a persistent question as Eleventh Amendment jurisprudence evolved. This Court recognized but declined to answer the question in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142 fn.1 (1993). This Court has ruled however, that only States have Eleventh Amendment sovereign immunity. *See, e.g., Seminole Tribe, Alden, supra.* Subsequent to the decision below, this Court, in *Northern Insurance Company of New York v. Chatham County, Georgia*, __ U.S. __, 2006 WL 1071413 *4 (U.S. 2006) held that "A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that *only States and arms of the State possess immunity from suits authorized by federal law.*" (Emph. Added). The Court below and the First Circuit however, granted "immunity from suits authorized by federal law" to the Commonwealth of Puerto

Rico, even though it is not a state. Although this Court did not address territorial sovereign immunity in the decision in *Northern Insurance Company*, that decision strongly suggests the error of the Court below.

IV. THE NATURE OF PUERTO RICO'S SOVEREIGN IMMUNITY IS A RECURRING QUESTION OF IMPORTANCE.

The degree of sovereign immunity possessed by the territories is an important question — not just for the roughly four million citizens of Puerto Rico, and not just for the citizens of the other territories. In the increasingly interconnected union, the question of whether territorial governments may be sued, as here, by citizens outside the territories for territorial actions in the States, is also increasingly important. Whether Puerto Rico can claim the benefit of sovereign immunity, either under the Eleventh Amendment, or effectively to the same extent under § 734, is of great importance to the citizens of Puerto Rico dealing with their government and to all individuals within the U.S. who have dealings with Puerto Rico.

This Court has addressed many other major questions concerning the scope of sovereign immunity, having thoroughly addressed state immunity, county immunity, immunity for Indian tribes,[4] and foreign sovereign immunity.[5] The scope of territorial immunity is a missing piece from the sovereign immunity puzzle. While three Circuits have each attempted to supply the appropriate doctrinal basis and scope of territorial

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4. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

5. *See Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (U.S. 2004); *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 126 S. Ct. 1193 (U.S. 2006).

immunity; none of the Circuits agree. Only this Court can clearly answer these important outstanding questions.

As discussed further below, the current split in the Circuits gives Congress no clear direction in how to make laws applicable to Puerto Rico. Under the Ninth Circuit's rule and the Territory Clause of the Constitution, Congress's authority to specify which laws apply to territories is plenary. The decision below would suggest Congress could make federal statutes applicable to Puerto Rico, provided it specifies that § 734 does not apply in each and every such statute. However, the decisions in the First Circuit suggest that any effort to make Puerto Rico liable would violate Puerto Rico's Eleventh Amendment immunity. This places Congress in an untenable bind – if it were to engage in the political entanglements necessary to specify which of the pre-existing statutes should apply to Puerto Rico, the First Circuit's Eleventh Amendment rulings would vitiate the result. Thus, only this Court's resolution of the questions presented in this petition can clarify which statutes are applicable to Puerto Rico and what steps Congress must take if it wishes to make Puerto Rico liable under federal statutes.

V. THE DECISION BELOW IS WRONG IN EXPANDING § 734 TO GRANT SOVEREIGN IMMUNITY TO PUERTO RICO.

The decision below wrongly interprets § 734. The decision of the D.C. Circuit affords Puerto Rico the same status as a state, even though it is not a state by misreading § 734. The clear purpose of § 734 was to make U.S. statutory law applicable in Puerto Rico, without requiring a specific Congressional declaration of applicability for each and every pre-existing or later-enacted statute. *Examining Bd. of*

Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 593 (1976). The decision below turns § 734 on its head, requiring an explicit declaration by Congress that Puerto Rico is liable to suit under every law that would otherwise be applicable in Puerto Rico.

Congress has repeatedly enacted general applicability clauses for territories as well as Indian tribes. *See* 48 U.S.C. § 1801 for CNMI, 48 U.S.C. § 734 for Puerto Rico, 48 U.S.C. §§ 1421b(u), 1421(c), 1421(n), and 1421(q) for Guam, 48 U.S.C. §§ 1405(q) and 1421(q)(1) for the Virgin Islands. *See also Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979) (Congress confers authority to regulate certain Indian tribes by criminal law to certain states). None of these statutes have ever previously been interpreted to mean that a territory enjoys constitutional sovereign immunity. This Court has reviewed § 734 before but it has never held that the statute was meant to confer immunity on Puerto Rico, even when its status differs from the states under the Constitution. *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 593 (1976); *see also Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 499 (1988).

Title 48 U.S.C. § 734 does not state its converse: laws inapplicable *in the states* are inapplicable in Puerto Rico. Nor does § 734 say that laws inapplicable *to* the states are inapplicable *to* Puerto Rico. Indeed, the FLSA is not inapplicable to the states, the states simply have a constitutional defense to private citizen suits for damages. *Alden, supra.* At most, the PRFRA holds that the FLSA *has* applicability in Puerto Rico as a statute applicable in the states (which is also what the FLSA itself states). The FLSA *is*

applicable in the states and Puerto Rico. But § 734 simply does not say that because states (as employer-defendants) have a Constitutional defense to individual claims in federal court under the FLSA, Puerto Rico gets the benefit of the same defenses, even though they would not get that benefit under the Constitution.

The D.C. Circuit's analysis puts Congress in an untenable position. Under the D.C. Circuit's analysis, Congress would be required to undertake a statute by statute review of which statutes should apply to Puerto Rico (though it has never had to do this for any other territory). However, by the First Circuit's decisions according Puerto Rico Eleventh Amendment immunity, any such specification is beyond Congress's power.

Furthermore, even if § 734 barred application of the FLSA to some extent in Puerto Rico, this case arose in New York, where plaintiff worked for the defendants. The language of § 734 is directed to what laws apply in Puerto Rico, not New York. Section 734 should not have been applied at all to this case because there is no question about the FLSA's applicability in New York.

The Court of Appeals wrongly expanded § 734 to one conferring on Puerto Rico the same constitutional defense from FLSA liability possessed by states. This strained reading of § 734 plainly expands the PRFRA well beyond its terms, beyond its clear purpose and to defeat the explicit directive of Congress that the Territories are liable to private citizens for violating the FLSA. 29 U.S.C. § 203(c), (e) and § 207(a)(1).

VI. THE DECISION BELOW DEFEATS CONGRESS'S EXPRESS DIRECTION THAT TERRITORIES SHOULD BE LIABLE TO EMPLOYEES FOR FLSA VIOLATIONS.

Congress made the FLSA applicable to employees in Puerto Rico. 29 U.S.C. 206(a)(2); *and see* 29 C.F.R. 776.7(b). The FLSA has long been applied in Puerto Rico and there is no doubt that the FLSA applies in Puerto Rico. *See, e.g., Herman v. Héctor I. Nieves Transport, Inc.*, 244 F.3d 32 (1st Cir. 2001) (FLSA applied in Puerto Rico). *See also Rivera v. Installation Club System*, 623 F. Supp. 269 (D.PR 1985) (FLSA applies to U.S. government defendants in Puerto Rico).

Congress clearly intended to abrogate Puerto Rico's sovereign immunity in the FLSA. This Court has already determined that Congress intended to abrogate the States' sovereign immunity in the same section that applies to Puerto Rico. *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62, 75-76 (2000) (29 U.S.C. § 216(b), applicable to FLSA and ADEA, intends to abrogate state immunity). The FLSA clearly intends private suits against governmental employers (including the territory of Puerto Rico) in abrogation of whatever sovereign immunity they possess.[6] Congress made Puerto Rico liable under the FLSA for overtime or other violations under the statute.

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6. Defendants did not dispute below that Congress intended an abrogation. Title 29 U.S.C. § 207(a)(1) makes employers liable for violations of the overtime law with respect to employees. 29 U.S.C. § 203(e) defines employees to include a variety of governmental employees, including federal, state, local and territorial government employees, with specific classes of such governmental employees exempted (not applicable here). Title 29 U.S.C. § 203(c) defines the term "State" to mean "any State of the United States or the District

(Cont'd)

Employees including the plaintiff are granted a private right of action against employers, including Puerto Rico, for violations of the FLSA under 29 U.S.C. § 216(b). Plaintiff is granted a private right of action against Puerto Rico. By applying § 734 to grant immunity to Puerto Rico from private suit, the decision below contravenes the important public purpose of the FLSA overtime and anti-retaliation protections. The Fair Labor Standards Act was designed,

> to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' ... Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

A.H. Phillips v. Walling, 524 U.S. 490, 493 (1945); *Powell v. U.S. Cartridge Co.*, 339 US 497, 70 S. Ct. 755 (1950). *See also United States v. Rosenwasser*, 323 U.S. 360, 65 S. Ct. 295, 296 (1945) ("no doubt as to the Congressional

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(Cont'd)

of Columbia or any Territory or possession of the United States." Puerto Rico is a "territory" of the United States. *See* 48 U.S.C. § 731 "Territory Included under Name Puerto Rico" *and see Harris v. Rosario*, 446 U.S. 651 (1980); *Americana of Puerto Rico, Inc. v. Kaplus*, 368 F.2d 431, 436 (3d Cir. 1966) ("Puerto Rico is a 'Territory' within the purview of Article IV, Section 3"), *certiorari denied*, 386 U.S. 943. Defendant admits that Congress intended to authorize private suits against public-employers such as the Commonwealth.

intention to include all employees within the scope of the Act unless specifically excluded.").

Exemptions from the Act's requirements are to be "narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S. Ct. 453, 456, 4 L. Ed. 2d 393 (1960). The burden of proving these exemptions is upon the employer, and if the record is unclear as to some exemption requirement, the employer will be held not to have satisfied its burden. *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 206, 86 S. Ct. 737, 747, 15 L. Ed. 2d 694 (1966).

Congress intended to make Puerto Rico liable under the FLSA. The decision below defeats Congress's clear intent by giving Puerto Rico an exemption to the FLSA.

CONCLUSION

The Court of Appeals' decision below conflicts with decisions in the Ninth and First Circuits as well as this Court's sovereign immunity jurisprudence. *See e.g. Northern Insurance Company of New York, supra.* Each Circuit has taken a different approach with respect to the sovereign immunity possessed by U.S. territories. This Petition for Certiorari should be granted so that this Court can resolve the confusion in the Circuits on the important question of the nature and extent of territorial sovereign immunity.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED FEBRUARY 3, 2006

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

Argued November 22, 2005 Decided February 3, 2006

No. 05-7029

EMMA RODRIGUEZ,
Individually and on Behalf of Others Similarly Situated,

Appellee

v.

PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION,
and Individual Defendants, *et al.*,

Appellants

UNITED STATES OF AMERICA,

Intervenor

Before: TATEL and GARLAND, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

Appendix A

TATEL, *Circuit Judge*: The issue presented arises from the intersection of the Puerto Rican Federal Relations Act (FRA), the Fair Labor Standards Act (FLSA), and principles of state sovereign immunity as set forth in two Supreme Court decisions: *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), and *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). Holding that Article I of the United States Constitution gives Congress no authority to abrogate State sovereign immunity, *Seminole Tribe* and *Alden* effectively invalidated the FLSA's private right of action as applied against state agencies. In this case, we must decide whether, despite those two decisions, the FLSA's private right of action still applies against an agency of the Puerto Rican government. Because FRA section 734 provides that "[t]he statutory laws of the United States . . . shall have the same force and effect in Puerto Rico as in the United States," and because *Seminole Tribe* and *Alden* have left the FLSA's private right of action without "force and effect" against state agencies "in the United States," we hold that it does not.

I.

Ending the Spanish American War, the 1899 Treaty of Paris ceded Puerto Rico to the United States as a territory entirely subject to Congress's regulatory will. Treaty of Paris, 30 Stat. 1754 (1899). According to the Treaty, "[t]he civil rights and political status of [Puerto Rico's] native inhabitants . . . shall be determined by the Congress." *Id.* at 1759. Moreover, Article IV of the Constitution authorizes Congress to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." *See* U.S. Const. art. IV, § 3, cl. 2.

Appendix A

In a series of statutes beginning with the Foraker Act of 1900 and culminating with the enactment of Public Law 600 in 1950, Congress granted Puerto Rico ever increasing self-governing authority. *See* Foraker Act, ch. 191, 31 Stat. 77 (1900) (establishing Puerto Rico's first civilian government and vesting it with executive, legislative, and judicial powers); Jones Act of 1917, ch. 145, 39 Stat. 951 (1917) (providing Puerto Rico with a wider degree of local self-government, establishing a territorial bill of rights, and conferring American citizenship on Puerto Rican citizens); Elective Governor Act, Pub.L. No. 80-362, 61 Stat. 770 (1947) (investing the People of Puerto Rico with full control over the executive branch); Act of July 3, Pub.L. No. 81-600, 64 Stat. 319 (1950). "[A]dopted in the nature of a compact," Public Law 600 authorized the People of Puerto Rico to "organize a government pursuant to a constitution of their own adoption." Act of July 3, Pub.L. No. 81-600, 64 Stat. 319 (1950). Through popular referendum, the People of Puerto Rico approved Public Law 600's proposed allocation of power—supreme national power to the U.S. Congress and full local control to the Puerto Rican government—and then adopted a draft constitution. Congress approved the constitution, subject to three amendments: two unrelated to the claim before us and one requiring any future amendments to be "consistent with the resolution enacted by the Congress of the United States approving this constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact." H.R.J. Res. 430, 82nd Cong. (1952). The Constitutional Convention of Puerto Rico accepted the amendments and then ratified the

constitution "in the name of the people." *See id.* (outlining procedure for ratification); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594-95, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976) (noting Puerto Rico's acceptance of amendments and ratification of the constitution).

Public Law 600 included the Puerto Rican Federal Relations Act, Act of July 3, Pub.L. No. 81-600, § 4, 64 Stat. 319 (1950), which codified all earlier statutory provisions regarding Puerto Rico that survived the Compact, including the following language first drafted for the Foraker Act: "[t]he statutory laws of the United States . . . shall have the same force and effect in Puerto Rico as in the United States." 48 U.S.C. § 734; *see* Jones Act of 1917, ch. 145, § 9, 39 Stat. 954 (1917) (containing section 734's language); Foraker Act, ch. 191 § 14, 31 Stat. 77 (1900) (containing language similar to section 734). Now found in FRA section 734 and central to the issue before us, that language has defined the application of federal law to Puerto Rico since 1900. *See, e.g., P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 499, 108 S.Ct. 1350, 99 L.Ed.2d 582 (1988) (relying on section 734 to delineate the test for federal preemption of Puerto Rican law).

The Fair Labor Standards Act protects employees from "labor conditions [that are] detrimental to the maintenance of the minimum standard of living," 29 U.S.C. § 202(a). The Act prescribes minimum wage and overtime rates for employees either engaged in interstate commerce or working for employers engaged in interstate commerce. *Id.* §§ 206, 207. In order "[t]o encourage employees to enforce their

FLSA rights in court, and thus to further the public policies underlying the FLSA," *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 n. 16, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), FLSA section 16(b) provides that "[a]n action to recover" for violations of the Act's minimum wage, overtime, and non-retaliation provisions "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees." 29 U.S.C. § 216(b). Congress added the parenthetical reference to public agencies—defined to include both states and territories—to "overcome . . . the Supreme Court [decision] in *Employees of the Department of Public Health v. Missouri* (411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251, April 18, 1973) which stated that Congress had not explicitly provided . . . [that] State and local employees could bring an action against their employer in a Federal court under section 16." H.R.Rep. No. 93-913, at 45 (1974); *see also* 29 U.S.C. § 203(x) (defining "[p]ublic agency" to include "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State"); *id.* § 203(c) (defining "State" to mean "any State of the United States or the District of Columbia or any Territory or possession of the United States").

In *Seminole Tribe*, however, the Supreme Court held that Article I gives Congress no authority to divest States of sovereign immunity from suit in federal court. *Seminole Tribe*, 517 U.S. at 72-73, 116 S.Ct. 1114. And three years later in *Alden*, which involved FLSA section 16(b), the Court extended *Seminole Tribe* to suits brought in state court. *Alden*, 527 U.S. at 754, 119 S.Ct. 2240. Taken together, *Seminole*

Tribe and *Alden* mean that state employees no longer have any "court of competent jurisdiction," 29 U.S.C. § 216(b), in which to sue their employers for FLSA violations.

Appellee, Emma Rodriguez, filed suit in the United States District Court for the District of Columbia under FLSA section 16(b), alleging that the Puerto Rico Federal Affairs Administration (PRFAA), an executive agency of the Commonwealth of Puerto Rico, violated the FLSA by underpaying her and then retaliating against her after she complained. PRFAA moved to dismiss, arguing that *Seminole Tribe* and *Alden* entitled it to sovereign immunity from FLSA suits. The district court denied the motion, explaining that "[i]t is for Congress, and not this court, to decide, in light of *Seminole Tribe* and its progeny," whether Puerto Rico should be subject to suit under section 16(b) when States are not. *Rodriguez v. P.R. Fed. Affairs Admin.*, 338 F.Supp.2d 125, 130 (D.D.C.2004). PRFAA then moved under section 1292(b) to certify the sovereign immunity question for interlocutory appeal. *See* 28 U.S.C. § 1292(b) (allowing district courts to certify for interlocutory appeal any "controlling question of law as to which there is substantial ground for difference of opinion and [if] an immediate appeal . . . may materially advance the ultimate termination of the litigation"). The district court granted the motion, *Rodriguez v. P.R. Fed. Affairs Admin.*, No. 03-2246 (D.D.C. Dec. 13, 2004), and PRFAA timely filed a petition for permission to appeal. Fed. R.App. P. 5(a) (requiring that parties petition for permission to bring discretionary appeals "within the time specified by the statute or rule authorizing the appeal"). Because the district court properly certified the issue, and because both parties encourage us to hear this appeal, we

grant PRFAA's petition. The federal government has intervened to defend the constitutionality of section 16(b) as applied to Puerto Rico.

II.

PRFAA argues that section 734 enunciates a "default rule" under which courts must construe federal statutes to apply equally to Puerto Rico and the fifty States unless Congress expressly provides otherwise. For additional support, PRFAA relies on the Compact, arguing that "no court should lightly infer that Congress has broken faith with its solemn undertaking in the Compact [to reaffirm and bolster Puerto Rico's sovereign immunity] in the absence of a clear statement of intent by the Congress." Appellants' Br. 7. Because *Seminole Tribe* and *Alden* bar section 16(b) suits against States, and because nothing in the FLSA reveals any congressional intent to treat Puerto Rico differently with respect to private section 16(b) suits, PRFAA argues that the district court should have dismissed Rodriguez's complaint. We agree.

FRA section 734 provides that "[t]he statutory laws of the United States . . . shall have the same force and effect in Puerto Rico as in the United States." 48 U.S.C. § 734. Here, we consider how to apply this mandate to FLSA section 16(b), which allows employees to maintain private actions against any employer, "including a public agency." 29 U.S.C. § 216(b). Section 3(x) defines "public agency" to include the government of a "State," 29 U.S.C. § 203(x), and section 3(c) defines a "State" to include "any State" or "any Territory," 29 U.S.C. § 203(c). If, as Rodriguez argues,

section 16(b) continues to authorize such actions against Puerto Rico, then the provision would have a different "force and effect in Puerto Rico [than it does] in the United States": in Puerto Rico a "State"—as defined by the statute—can be sued, while in the United States, after *Seminole Tribe* and *Alden*, a "State" cannot. The only way to give section 16(b) "the same force and effect in Puerto Rico as in the United States" is to hold, as PRFAA urges, that Puerto Rico likewise enjoys immunity from private FLSA enforcement suits.

The district court is certainly correct that "[i]t is for Congress, and not this court," to decide what to do with section 16(b) given *Seminole* Tribe and *Alden*. *Rodriguez*, 338 F.Supp.2d at 130. Indeed, as Rodriguez points out, *Seminole Tribe* itself says that courts are not "free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that [the provision] was beyond its authority." *Seminole Tribe*, 517 U.S. at 76, 116 S.Ct. 1114. Here, however, we need not "rewrite the statutory scheme" to reflect what "we think Congress might have wanted had it known" that section 16(b)'s private right of action could no longer be applied to States. FRA section 734, though originally enacted almost a century before *Seminole Tribe* and *Alden*, tells us exactly how to apply section 16(b) to Puerto Rico now that, by virtue of those two decisions, its private right of action has become inapplicable to States. Specifically, section 16(b)'s private right of action must have the same "force and effect" against "State" agencies in Puerto Rico, namely no force or effect at all. *See* 29 U.S.C. § 203(c) (defining "State" to include territories for FLSA purposes).

Appendix A

The First Circuit, the court most expert on Puerto Rico's status, agrees. In *Jusino Mercado*, also a section 16(b) suit against Puerto Rico, the First Circuit concluded:

> [G]iven the language of the FLSA, the context in which Congress amended it to reach public agencies, and the guidance provided by the Federal Relations Act, reading the law to intrude more profoundly on Puerto Rico's sovereignty than on that of the states would contradict what we discern to be Congress's manifest intent. To harmonize our reading of the statute with this intent and to maintain the parallelism that Congress sought to achieve, we construe the FLSA as failing to overcome Puerto Rico's immunity.

Jusino Mercado v. Puerto Rico, 214 F.3d 34, 44 (1st Cir.2000).

Rodriguez's arguments to the contrary are unpersuasive. First, twisting section 16(b)'s plain language, she argues that "[a]t most, the [FRA] holds that the FLSA *has* applicability in Puerto Rico [because the] statute [is] applicable in the states." Appellee's Br. 21. But, she continues, section 734 does not accord to Puerto Rico the same defense to individual claims in federal court that the U.S. Constitution provides States. Although it is true that the FLSA *applies* both in the United States and in Puerto Rico, Congress commanded that section 16(b) apply to Puerto Rico according to its *force* and *effect* in the United States. After *Seminole Tribe* and *Alden*, section 16(b) no longer has the force and effect Congress purported to give it: States now enjoy immunity from private

rights of action. Section 734's "same force and effect" command thus requires that we accord the same immunity to Puerto Rico.

Pointing out that Congress intended the FLSA to apply broadly to "all employees within the scope of the Act," *United States v. Rosenwasser*, 323 U.S. 360, 363, 65 S.Ct. 295, 89 L.Ed. 301 (1945), Rodriguez next argues that "under the FLSA's rules of interpretation[ ], there can be no implied exemptions to the FLSA," Appellee's Br. 22. But Rodriguez provides no citation to any FLSA "rules of interpretation," and we are unaware of any such rules. More important, our ruling today creates no "implied exemption" to the FLSA, but merely follows Congress's express direction to give "[t]he laws of the United States . . . the same force and effect in Puerto Rico as in the United States." 48 U.S.C. § 734.

Next, Rodriguez urges us to ignore section 734 altogether since "an implicit 'default rule' cannot be said to override explicit language in a statute that clearly expresses a contrary position. Because Congress made Puerto Rico liable under the FLSA specifically, the default rule cannot trump Congress's specific instructions." Appellee's Br. 22. But neither section 16(b) nor the definitional terms it incorporates "specifically" refer to Puerto Rico. FLSA section 3(c) broadly defines the term "State"—a category of "covered employers"—to include "any State of the United States or the District of Columbia or any *Territory*." 29 U.S.C. § 203(c) (emphasis added). By comparison, section 734 applies expressly to Puerto Rico. Accordingly, because the canons of statutory construction require that the specific govern the general, instead of ignoring section 734, we must apply

section 16(b) (the more general of the two provisions) as directed by section 734, giving it the same "force and effect in Puerto Rico as in the United States."

Last, assuming for argument's sake that the "default rule" applies, Rodriguez argues that it does "not bar this suit, because there is a rational basis for treating Puerto Rico differently from the states—namely that the states have constitutional sovereign immunity . . . and Puerto Rico does not." Appellee's Br. 22. The fact that Congress may have had a rational basis for treating Puerto Rico differently from States, however, is irrelevant given that it expressly chose not to do so for purposes of section 16(b) private enforcement actions. 29 U.S.C. § 216(b) (providing "[a]n action to recover" for FLSA violations "may be maintained against any employer (including a public agency)"; *id.* § 203(x) (defining "[p]ublic agency" to include "any agency of . . . a State"); *id.* § 203(c) (defining "State" to include "any State" and "any Territory"). Because of this, and because of section 734's "same force and effect" command, we have no basis for treating Puerto Rico differently from the fifty States.

We reverse the district court's decision and remand with instructions to dismiss the complaint.

So ordered.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED SEPTEMBER 30, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 03-2246 (JR)

EMMA RODRIGUEZ,

Plaintiff,

v.

PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, *et al.*,

Defendants.

MEMORANDUM

Plaintiff brings this claim under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA"). She alleges that defendants, an executive agency of the Commonwealth of Puerto Rico and supervisory employees of that agency, violated FLSA by 1) failing to pay her for all hours that she worked for defendants; 2) failing to pay her overtime wages for work over 40 hours per week; and 3) retaliating against her by terminating her employment when she complained about defendants' failure to pay proper wages.

Appendix B

Defendants have moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing that the Puerto Rico Federal Affairs Administration is immune from this suit under principles of sovereign immunity and that retaliation protection is not available under FLSA for plaintiffs who have made internal complaints about alleged violations of FLSA. For the reasons set forth below, defendants' motion must be denied.

Sovereign Immunity

Defendants claim that this court is without jurisdiction to hear this complaint because the PRFAA, an agency of the Commonwealth of Puerto Rico, is immune from private suits for damages under the doctrine of sovereign immunity.[1] Defendants also assert that employees of the agency enjoy derivative immunity. (Obviously, if the PRFAA is not immune, which it is not, its employees also lack immunity.)

FLSA, as amended in 1974, permits private suits for monetary damages against "any employer (including a public agency) in any Federal or State court. . . ." 29 U.S.C. § 216(b). "Public agency" is defined to mean: "the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency." 29 U.S.C. § 203(x). "State" is defined to mean: "any State of the United States or the District of Columbia or any Territory or possession of

1. It appears to be conceded that the PRFAA shares whatever sovereign immunity Puerto Rico has.

the United States." 29 U.S.C. § 203(c). It is not disputed that Puerto Rico is a territory. *See generally Harris v. Rosario*, 446 U.S. 651, 651-52, 100 S.Ct. 1929, 64 L.Ed.2d 587 (1980) (finding Congress has power over Puerto Rico under the Territory Clause of the Constitution, U.S. Constit. art. IV, § 3, cl. 2); *Americana of P.R., Inc. v. Kaplus*, 368 F.2d 431, 433-36 (3rd Cir.1966), *cert. denied*, 386 U.S. 943, 87 S.Ct. 977, 17 L.Ed.2d 874 (1967) (providing extensive analysis of Puerto Rico's position under the Territory Clause). The current FLSA language was written in 1974 specifically "to make clear the right of individuals employed by state and local governments and political subdivisions to bring private actions to enforce their rights and recover back wages under [FLSA]" in light of judicial limitations on this right. H.R. Rep. 93-913, at 41 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2850.

In a series of recent sovereign immunity cases beginning with *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the scope and underpinnings of state sovereign immunity and the Eleventh Amendment[2] have shifted dramatically, radically altering prior understandings of the ability of private parties to sue states for monetary

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2. Sovereign immunity of the type addressed in this case is often referred to as "Eleventh Amendment immunity." However, the Supreme Court has recently indicated that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Alden v. Maine*, 527 U.S. 706, 728, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999). In light of this opinion, and the Eleventh Amendment's explicit reference to "states" and not territories, *see* U.S. Const. amend. XI, the general term "sovereign immunity" is most appropriate for this opinion.

damages under federal law. As part of this shift, a number of Circuit courts have ruled that states are immune from wage and overtime suits in federal court under 29 U.S.C. § 216(b). *See, e.g., Mills v. Maine*, 118 F.3d 37, 41-50 (1st Cir.1997); *Raper v. Iowa*, 115 F.3d 623 (8th Cir.1997); *Aaron v. Kansas*, 115 F.3d 815 (10th Cir.1997). It seems a reasonable prediction that the D.C. Circuit would follow this lead, especially in light of *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999), holding Maine immune from an overtime suit in *state* court under 29 U.S.C. § 216(b).[3]

The question, then, is whether Puerto Rico enjoys the same sovereign immunity from suits under federal law as the states. The most recent Supreme Court opinion to address the issue explicitly withheld decision. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 141 n. 1, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) (noting that First Circuit law that Puerto Rico is a state for Eleventh Amendment purposes had not been challenged and thus declining to rule on the issue). Defendants point out, correctly, that virtually every court that has addressed the

3. Additionally, in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), the Court found that states were immune from similar suits in federal court under the Age Discrimination in Employment Act (ADEA), enforced through same provision of FLSA that is at stake here—29 U.S.C. § 216(b). Note that the Equal Pay Act provisions of FLSA present Fourteenth Amendment issues not relevant to general wage and overtime concerns, and may well abrogate state sovereign immunity. *See, e.g., Varner v. Illinois State Univ.*, 226 F.3d 927 (7th Cir.2000), *cert. denied*, 533 U.S. 902, 121 S.Ct. 2241, 150 L.Ed.2d 230 (2001) (holding that Equal Pay Act validly abrogates state sovereign immunity).

issue has found Puerto Rico immune from suit in parallel with the states. With the notable exceptions discussed below, however, the cases declaring this immunity have either simply assumed the existence of immunity or ruled without discussion, citing to a somewhat tangled web of other cases that also provide no discussion. And none of them addresses the specific concerns that arise here, where it is Congress, and not a state or local government, that has created a cause of action that may impose liability upon Puerto Rico or one of its agencies. *See, e.g., Ortiz-Feliciano v. Toledo-Davila*, 175 F.3d 37, 39 (1st Cir.1999) (summary citation to *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth.*, 991 F.2d 935 (1st Cir.1993)); *Metcalf & Eddy, Inc.*, at 939 n. 3 (citation with no discussion to four other cases that also offer no substantial discussion of the point); *Ezratty v. Puerto Rico*, 648 F.2d 770 n. 7 (1st Cir.1981) (Breyer, J.) (citation with no discussion to two other cases); *Salkin v. Puerto Rico*, 408 F.2d 682, 683 (1st Cir.1969) (assumption that Puerto Rico is covered by "the well established federal deference to the right of a sovereign power to withhold all consent to suit"); *Felix v. Haggerty*, No. 80-1075, 1980 WL 326, at *1 (D.D.C. Oct. 21, 1980) (summary citation to two other cases).

At the bottom of this pile of authorities lies a 1913 Supreme Court case, *People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 33 S.Ct. 352, 57 L.Ed. 507. In *People of Porto Rico*, the Court noted that "aside from the existence of some exception, the government which [Congress in] the organic act established in Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent." *Id.* at 273, 33 S.Ct. 352. If Congress had allowed

Puerto Rico to be sued, the Court went on to conclude, such suits would be permissible. *Id.* at 274-77, 33 S.Ct. 352.

What Congress giveth, Congress may take away, fully consistent with the Territory Clause of the Constitution: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Constit. art. IV, § 3, cl. 2. *See also Harris*, 446 U.S. 651, 651-52, 100 S.Ct. 1929, 64 L.Ed.2d 587 (1980) (holding that under the Territory Clause, Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions"). There have been many changes since 1913 in Puerto Rico's status and the doctrine of sovereign immunity. However, defendants do not dispute the proposition that Congress has the power to abrogate any sovereign immunity that Puerto Rico may possess with regard to a Congressionally-created cause of action such as FLSA, and that it exercised that power when it amended the FLSA in 1974.

This understanding of Puerto Rico's sovereign immunity as being different from that of the states, and subject to Congressional limitation, is fully consistent with the Supreme Court's recent discussions on the nature of state sovereign immunity in *Alden v. Maine*:

> [A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either

> literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional amendments.

527 U.S. at 713, 119 S.Ct. 2240. Given Puerto Rico's history as a territory, and not a state, Puerto Rico cannot be said to have constitutional sovereign immunity. Thus there is no reason to assume that whatever sovereign immunity it might possess is parallel to that of the states or that it is not subject to Congressional restriction under the Territory Clause.

Acknowledging all of the above arguments, defendants continue to maintain that Puerto Rico is immune from the present FLSA suit. They rely for this argument almost exclusively on *Jusino Mercado v. Puerto Rico*, 214 F.3d 34 (1st Cir.2000), a case that grants Puerto Rico sovereign immunity from private suit under the general wage and overtime provisions of FLSA.

Jusino Mercado's holding is grounded in statutes, not the constitution. *Id.* at 44. The opinion relies heavily on the Puerto Rican Federal Relations Act, 48 U.S.C. § 734, for the proposition that "[t]he statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States. . . ." Additionally, the First Circuit noted that Congress intended Puerto Rico's commonwealth status " 'to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union.' " *Jusino Mercado*, 214 F.3d at 42 (quoting *Examining Bd. of Eng'rs, Architects & Surveyors*

v. Flores de Otero, 426 U.S. 572, 594, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976)). Thus, the First Circuit determined that, "long before Congress enacted the relevant provision of FLSA, it had put firmly in place a default rule: statutes of general application would apply equally to Puerto Rico and to the fifty states *unless* Congress made specific provision for differential treatment." *Id.* (emphasis in original). Alternatively, Puerto Rico could still be treated differently if there were a "compelling reason." *Id.*

So far, so good. But then the First Circuit came face-to-face with the unambiguous language of the 1974 amendments to FLSA that subjected Puerto Rico—and the states—to liability in private lawsuits for monetary damages. 29 U.S.C. § 216(b). The unsatisfying and unpersuasive result was this:

> To sum up, there is absolutely no evidence that Congress intended to treat Puerto Rico differently than the fifty states for purposes of the FLSA's enforcement provision. Nor have the appellants identified any compelling policy reasons that might propel us towards such a result. Hence, in accordance with 48 U.S.C. § 734, we conclude that *the language in the FLSA that courts have deemed insufficient to abrogate states' immunity is equally insufficient to undermine Puerto Rico's immunity.* When Congress provided for suits by individual employees against public agencies "in any Federal or State court of competent jurisdiction," it did not intend for that jurisdiction to encompass suits against Puerto Rico more readily than suits against the states. Indeed, it is

> inconceivable to us that Congress would have chosen to invoke the Territorial Clause to impose the FLSA on Puerto Rico had it known that it could not impose an equivalent burden on the fifty states.

Id. at 44 (emphasis added). Among the many problems with this argument, the most important is the First Circuit's refusal to deal head-on with the *reason* why the 1974 amendments to FLSA have been "deemed insufficient to abrogate states' immunity." The rationale of *Seminole Tribe* and its progeny is grounded in the constitution. The constitution does not limit the power of Congress to abrogate Puerto Rico's sovereign immunity. Instead, it actually empowers Congress to do so. The First Circuit's inability to conceive that Congress would have chosen to impose FLSA on Puerto Rico had it known that it could not do so for the states, and its purported certainty about what Congress meant when it enacted the 1974 amendments, amount to, I respectfully suggest,[4] (i) speculation, (ii) about legislative intent, (iii) in the face of unambiguous statutory language requiring a different result.

The standard, traditional canon of severability is that "unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be

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4. I accept the defendants' suggestion that deference is owed to the First Circuit's views on sovereign immunity for Puerto Rico, since the First Circuit is the court primarily entrusted with issues relating to Puerto Rico. Rulings of the First Circuit are not binding upon this court, however.

dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987). Nobody has suggested that "what is left" here—possible liability under FLSA for Puerto Rico, but not for states—is not fully "operative as a law." We may presume that Congress did not in fact anticipate that its power to apply FLSA to the states would be curtailed, but nobody can say how Congress would have shaped the FLSA amendments if it had been so prescient, nor am I free to decide the issue presented here on the basis of my own belief as to what Congress would have done. I can say what Congress did do, which was permit private law suits for monetary damages against Puerto Rico under FLSA. Congress had the power to do this. It is for Congress, and not this court, to decide, in light of *Seminole Tribe* and its progeny, what to do next.

Retaliation For Internal Complaints Under FLSA

FLSA makes it illegal "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding. . . ." 29 U.S.C. § 215(a)(3). Plaintiff's complaint alleges that she "repeatedly requested proper payment of her overtime and other wages, but did not receive them," Pltf.'s Compl. ¶ 23, and that she was "terminated shortly after she complained to defendants regarding their failure to properly pay her." *Id.*, ¶ 24.

Defendants, taking the plain language side of the argument in this part of the case, argue that FLSA's anti-

retaliation language does not protect employees from retaliation for making internal complaints to an employer about possible FLSA violations. The Second and the Fourth Circuits have sustained that view. *Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 363-65 (4th Cir.2000); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2nd Cir.1993). Both courts have drawn conclusions favorable to defendants' view of FLSA's narrow language by contrasting it with the much broader language of Title VII of the Civil Rights Act of 1964, 42 U.S.C.2000e et seq. ("Title VII"). *Ball*, 228 F.3d at 364; Lambert, 10 F.3d at 55.[5] Congress knows how to be broad when it wants to be broad.

Seven other circuits have found that FLSA does bar retaliation for at least some purely internal complaints. *See, e.g., Valerio v. Putnam Associates Inc.*, 173 F.3d 35 (1st Cir.1999); *Brock v. Richardson*, 812 F.2d 121 (3rd Cir.1987); *EEOC v. Romeo Cmty. Schools*, 976 F.2d 985 (6th Cir.1992); *Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir.1975); *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir.1999); *Love v. RE/MAX of America, Inc.*, 738 F.2d 383 (10th Cir.1984); *EEOC v. White & Son Enter.*, 881 F.2d 1006, (11th Cir.1989). These opinions exhibit a range of rationales, but most of them note important Supreme Court decisions indicating that FLSA should not be interpreted too narrowly and stressing the importance of substantive anti-retaliation protection. *See, e.g., Valerio*, 173 F.3d at 41-44; *White & Son Enterprises*, 881 F.2d at 1011-12;

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5. Under Title VII, it is unlawful "for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

see also Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597, 64 S.Ct. 698, 88 L.Ed. 949 (1944). Those interpretational guides have led those courts to find that FLSA's language does cover internal complaints. *See, e.g., Lambert*, 180 F.3d at 1004 (finding that "filed any complaint" could be interpreted to encompass internal complaints, especially given the common labor practice of "filing" internal grievances with employers).

This issue appears to be one of first impression in the D.C. Circuit. It should not be decided on this record. The narrow holdings of the Second and Fourth Circuits are more consistent with FLSA's language, but we do not know enough to apply that language with precision. Plaintiff alleges only that she was fired after complaining to her employer about alleged violations of FLSA. She does not indicate whether or not she filed any complaint with anyone (internal or external), instituted any proceeding, or testified or was about to testify in any proceeding. Since I cannot say that there is no version of the facts upon which plaintiff could prevail on her claim, the prudent course is to allow further development of the record.

* * *

An appropriate order accompanies this memorandum.

ORDER

For the reasons stated in the accompanying memorandum, defendant's motion to dismiss is **denied**.

(2)

Supreme Court, U.S.
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No. 05-1410

In the Supreme Court of the United States

EMMA RODRIGUEZ, PETITIONER

v.

PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, *ET AL.*, RESPONDENTS

UNITED STATES OF AMERICA, INTERVENOR

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that Puerto Rico, like the States, cannot be sued for damages under the Fair Labor Standards Act, where the States are immune from suit under the Act, the Act defines "State" to include territories such as Puerto Rico, and the Puerto Rican Federal Relations Act commands that "[t]he statutory laws of the United States * * * shall have the same force and effect in Puerto Rico as in the United States."

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INTRODUCTION

The only question decided by the Court of Appeals was whether Puerto Rico, unlike the fifty States, can be sued for damages under the Fair Labor Standards Act ("FLSA") despite the clear directive in the Puerto Rican Federal Relations Act ("PRFRA") that "[t]he statutory laws of the United States * * * shall have the same force and effect in Puerto Rico as in the United States." The court below correctly determined, as a matter of statutory interpretation, that Puerto Rico is no more subject to FLSA damages suits than are the States. That conclusion is fully consistent with this Court's decisions, and there is no circuit conflict on this issue. Indeed, the only other circuit to address it—the First Circuit—has consistently ruled the same way.

STATEMENT

1. The Puerto Rico Federal Affairs Administration ("PRFAA") is an executive agency of the Commonwealth of Puerto Rico. Petitioner was employed by the PRFAA in its voter registration project in New York, New York. Petitioner sued the PRFAA in the district court, claiming that the PRFAA violated the FLSA by (1) failing to pay her for all the hours she worked; (2) failing to pay her overtime wages; and (3) firing her when she complained about these violations. The PRFAA moved to dismiss petitioner's complaint on the ground that the PRFAA, as an agency of the Commonwealth of Puerto Rico, has sovereign immunity from a private suit for damages under the FLSA.

Section 16(b) of the FLSA provides that "[a]n action to recover" for violations of the FLSA "may be maintained against any employer (including a public agency) * * * by any one or more employees" (29 U.S.C. § 216(b)), and the statute further defines "public agency" to include "the government of a State" and "any agency of * * * a State" (*id.* § 203(x)). The term "State" means "any State of the

United States or the District of Columbia or any Territory or possession of the United States." *Id.* § 203(c).

Although Section 16(b) of the FLSA purports to allow a suit against a State, this Court held in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), that Article I of the Constitution does not empower Congress to abrogate the States' sovereign immunity from suit in federal court. Three years later, the Court in *Alden* v. *Maine*, 527 U.S. 706 (1999), applied the same rule in a case involving a claim brought in state court pursuant to Section 16(b) of the FLSA. Thus, whatever Congress intended to permit in Section 16(b), this Court foreclosed the possibility of a private action for damages against a State. As the Court of Appeals noted, "*Seminole Tribe* and *Alden* mean that state employees no longer have any 'court of competent jurisdiction' in which to sue their employers for FLSA violations." Pet. App. 5a-6a (citation omitted).

2. The district court rejected the PRFAA's sovereign immunity defense, holding that Puerto Rico—unlike the States—has no immunity from private actions for damages under the FLSA. The court recognized that "virtually every court that has addressed the issue"—including the First Circuit—"has found Puerto Rico immune from suit in parallel with the states." Pet. App. 15a-16a. Nevertheless, the court concluded that "Puerto Rico cannot be said to have constitutional sovereign immunity" because it is "a territory, and not a state." Pet. App. 18a. And since Puerto Rico's sovereign immunity did not have the same origin as the States' sovereign immunity, the district court concluded that "there is no reason to assume that whatever sovereign immunity [Puerto Rico] might possess is parallel to that of the states or that it is not subject to Congressional restriction under the Territory Clause." *Ibid.*

The district court then held that Congress had validly abrogated Puerto Rico's sovereign immunity when it amended the FLSA to permit private actions against

"public agencies," including the government of Puerto Rico. See Pet. App. 17a. Although this Court in *Seminole Tribe* and *Alden* had invalidated Section 16(b) as it applied against the States, the district court held that the offending provisions of the statute were severable, such that Section 16(b) could continue to operate against Puerto Rico. See Pet. App. 20a-21a.

The district court certified its decision for interlocutory appeal under 28 U.S.C. § 1292(b), and the Court of Appeals granted permission to appeal. The United States intervened to defend the constitutionality of Section 16(b) as applied to Puerto Rico.[1]

3. The Court of Appeals reversed. Rather than address the question (presented in briefs and at oral argument) whether Puerto Rico has *constitutional* sovereign immunity, the court rested its decision solely on the PRFRA, which provides that "[t]he statutory laws of the United States * * * shall have the same force and effect in Puerto Rico as in the United States." 48 U.S.C. § 734. As the court noted, this command of equal treatment "has defined the application of federal law to Puerto Rico since 1900." Pet. App. 4a.

The question, then, was what "force and effect" Section 16(b) of the FLSA could be given in Puerto Rico consistent with the command of Section 734 of the PRFRA. It was not enough to say that Congress intended Section 16(b) to operate against the States and Puerto Rico, for this Court had already invalidated the statute as it applied to the States. As the Court of Appeals explained, "[a]fter *Seminole Tribe* and *Alden*, section 16(b) no longer has the

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[1] The United States "expresse[d] no view regarding the statutory issue presented by the Federal Affairs Administration," but argued only that Congress has the power under the Constitution to subject Puerto Rico to suit by private parties for violations of the FLSA. Br. for the United States as Intervenor at 11.

force and effect Congress purported to give it: States now enjoy immunity from private rights of action." Pet App. 9a-10a. And since the States could not be sued under Section 16(b), that provision had no "force" or "effect" in the United States.

Contrary to petitioner's assertion, it required no great imagination to determine whether Congress intended to apply Section 16(b) to Puerto Rico when that provision could not apply to the States. "FRA section 734, though originally enacted almost a century before *Seminole Tribe* and *Alden*, tells us exactly how to apply section 16(b) to Puerto Rico now that, by virtue of those two decisions, its private right of action has become inapplicable to States." Pet. App. 8a. Section 734 commands equal treatment, and "[t]he only way to give section 16(b) 'the same force and effect in Puerto Rico as in the United States' is to hold, * * * that Puerto Rico likewise enjoys immunity from private FLSA enforcement suits." *Ibid.*

REASONS FOR DENYING THE PETITION

Contrary to petitioner's arguments, the decision below was a straightforward and correct application of the PRFRA. It is fully consistent with this Court's decisions. And it does not conflict with decisions in any other circuit; indeed, adoption of petitioners' argument would have placed the court below in square conflict with longstanding holdings of the First Circuit.

I. The Court of Appeals Correctly Decided That The Federal Relations Act Requires Equal Treatment Of Puerto Rico And The States.

From the earliest stages of its relationship with Puerto Rico, Congress has provided that federal statutes must have the same force and effect in Puerto Rico as in the States. The Court of Appeals properly applied this default rule of equal treatment to conclude that Puerto Rico, like the States, cannot be sued for damages under Section 16(b) of the FLSA.

1. From 1899 to 1950, Congress steadily granted an increasing measure of autonomy to the people of Puerto Rico, and this Court consistently acknowledged the unique position of Puerto Rico among American territories. In 1899, Congress ratified the Treaty of Paris, which formally concluded the Spanish-American War and ceded the island of Puerto Rico and other Spanish possessions to the United States. See 30 Stat. 1754 (1899). The treaty provided that "[t]he civil rights and political status of the native inhabitants" of Puerto Rico and the ceded territories "shall be determined by the Congress." 30 Stat. 1759.

To govern its new relationship with Puerto Rico, Congress enacted the Foraker Act, 31 Stat. 77 (1900). The Foraker Act recognized a political entity known as the "People of Porto Rico," but did not recognize the inhabitants of Puerto Rico as United States citizens or provide any sort of self-government. 31 Stat. 79. The Act vested executive authority in a governor and top department chiefs appointed by the President. See 31 Stat. 81. Local legislative authority was assigned to an assembly consisting of an executive council appointed by the President and a house of delegates elected by popular vote. See 31 Stat. 82. The Act required that "[a]ll laws enacted by the legislative assembly shall be reported to the Congress of the United States," which reserved the right, "if deemed advisable, to annul the same." 31 Stat. 83. The justices of the Supreme Court of Puerto Rico were appointed by the President with the consent of the Senate, while the judges of inferior courts were appointed by the governor with the consent of his executive council. See 31 Stat. 84.

Most important here, Section 14 of the Foraker Act provided that "the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws." 31 Stat. 80.

This Court soon acknowledged that the Foraker Act created "a completely organized Territory" in Puerto Rico. *New York ex rel. Kopel* v. *Bingham*, 211 U.S. 468, 476 (1909). And in 1913, the Court in *People of Porto Rico* v. *Manuel Rosaly y Castillo*, 227 U.S. 270 (1913), held that the government of Puerto Rico could not be sued without its consent. Even in 1913, it was "not open to controversy that, aside from the existence of some exception, the government which the [Foraker Act] established in Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent." *Id.* at 273.

Congress later enacted the Jones Act, 39 Stat. 951 (1917), which granted United States citizenship to all the inhabitants of Puerto Rico (see 39 Stat. 953) and provided them with a bill of rights (see 39 Stat. 951-952). Although the governor, attorney general, commissioner of education, an auditor, and the justices of the Supreme Court remained presidential appointees (see 39 Stat. 955, 957, 965), the Jones Act made the legislature more representative by replacing the executive council with a popularly elected senate (see 39 Stat. 958-959). As under the Foraker Act, all laws enacted by the Puerto Rican legislature were reported to Congress for its approval. See 39 Stat. 961. The Jones Act repeated the command that "the statutory laws of the United States not locally inapplicable[] * * * shall have the same force and effect in Porto Rico as in the United States." 39 Stat. 954.

This Court in *People of Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937), noted the remarkable sweep of authority granted by Congress to the government of Puerto Rico in the Foraker Act and the Jones Act. "The aim of the Foraker Act and the [Jones] Act," the Court wrote, "was to give Puerto Rico full power of local self-determination with an autonomy similar to that of the states and incorporated territories. The effect was to confer upon the territory many of the attributes of quasi sovereignty possessed by the states—as, for example, immunity from suit without

their consent." *Id.* at 261-262 (citations omitted). By these statutes, Congress gave Puerto Rico "the typical American governmental structure, consisting of the three independent departments—legislative, executive and judicial," and it created in Puerto Rico "[a] body politic—a commonwealth." *Id.* at 262 (quotations and citation omitted). The Foraker Act and the Jones Act together granted the government of Puerto Rico "[t]he power of taxation, the power to enact and enforce laws, and other characteristically governmental powers," and "so far as local matters are concerned, * * * legislative powers were conferred nearly, if not quite, as extensive as those exercised by the state legislatures." *Ibid.*; accord *Gromer* v. *Standard Dredging Co.*, 224 U.S. 362, 370 (1912) ("The purpose of the act is to give local self-government, conferring an autonomy similar to that of the states and Territories").

Congress did not stop with the Jones Act. In 1947, it enacted the Elective Governor Act, 61 Stat. 770, which amended the Jones Act to provide for popular election, rather than presidential appointment, of Puerto Rico's governor (see 61 Stat. 770-771), and appointment by the governor of all executive department heads (see 61 Stat. 771). The house of representatives was given exclusive authority to impeach the governor, while the senate had the sole power to try all impeachments. See *ibid.* The Act further provided that "[t]he rights, privileges, and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union." 61 Stat. 773. Thus, by 1947, the people of Puerto Rico were recognized as United States citizens with a government in all significant respects similar to that of a State.

2. These developments set the stage for enactment of the legislation specifically at issue in this case. Although Congress had granted increasing measures of autonomy to the inhabitants of Puerto Rico, it retained the prerogative to annul laws passed by the local legislature (see 39 Stat.

961)—a power fundamentally inconsistent with Puerto Rican self-government. "By 1950, however, pressures for greater autonomy led to congressional enactment of Pub. L. 600, which offered the people of Puerto Rico a compact whereby they might establish a government under their own constitution." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 671 (1974) (citation omitted).

Acknowledging that it had "progressively recognized the right of self-government of the people of Puerto Rico" and that "an increasingly large measure of self-government ha[d] been achieved," Congress finally provided a mechanism whereby the people of Puerto Rico could adopt their own constitution and form their own government. 64 Stat. 319 (1950). Public Law 600 proposed to repeal the structural provisions of the Jones Act—providing for an executive, a legislature, and territorial courts—and to replace those provisions with a new constitution to be adopted by the people of Puerto Rico. See 64 Stat. 319-320. The remaining provisions of the Jones Act would continue in effect as the PRFRA. See 64 Stat. 319.

By its own terms, Public Law 600 was not just another organic statute for Puerto Rico, a successor to the Foraker Act and the Jones Act. Rather, it was a statute "*in the nature of a compact*" agreed to by Congress and the people of Puerto Rico. 64 Stat. 319, codified at 48 U.S.C. § 731b (emphasis added). Unlike other statutes, this compact would not take effect until it was approved by *both* Congress *and* the people of Puerto Rico in a referendum. See 64 Stat. 319, codified at 48 U.S.C. §§ 731c, 731d. Indeed, "[t]he consent of Puerto Rico was a requisite to the effectiveness of the Act." *Mora* v. *Torres*, 113 F. Supp. 309, 315 (D.P.R. 1953).

Congress approved Public Law 600 in July 1950, and in June 1951 the people of Puerto Rico approved the terms of this compact in a referendum by a 3-to-1 margin. See Hon. Calvert Magruder, *The Commonwealth Status of*

Puerto Rico, 15 U. Pitt. L. Rev. 1, 9 (1953). Eight months later, a constitutional convention approved a draft constitution that expressly created a "commonwealth" with three branches of government operating under a bill of rights in significant respects identical to the United States Constitution. See *ibid.* In a resolution adopted at the constitutional convention, delegates expressed their understanding of the new political order they were creating: "Thus we attain the goal of complete self-government, the last vestiges of colonialism having disappeared in the principle of Compact, and we enter into an era of new developments in democratic civilization. Nothing can surpass in political dignity the principle of mutual consent and of compacts freely agreed upon." IV Diario de Sesiones de la Convención Constituyente de Puerto Rico 2409-2410 (1952); see also *Mora*, 113 F. Supp. at 317 (quoting Resolution No. 23).

After the people of Puerto Rico approved this new constitution in a referendum, President Truman submitted the charter to Congress for its approval. According to the President, congressional approval of the new constitution would vest "full authority and responsibility for local self-government" in the people of Puerto Rico. H.R. Rep. No. 1832, at 10 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1899, 1902. Congress gave its approval (see 66 Stat. 327), which the President described as the "culmination of a consistent policy of the United States to confer an ever-increasing measure of local self-government upon the people of Puerto Rico." *Liquilux Gas Servs. of Ponce, Inc.* v. *Tropical Gas Co.*, 303 F. Supp. 414, 418 (D.P.R. 1969).

With the adoption and ratification of the Puerto Rico Constitution, the United States acknowledged Puerto Rico's new status in the international community. In a 1953 memorandum, the United States advised the United Nations that it would no longer report statistical and technical information concerning conditions in Puerto Rico, because Puerto Rico had become a self-governing

territory. See Memorandum by the Government of the United States of America Concerning the Cessation of Transmission of Information Under Article 73(e) of the Charter With Regard to the Commonwealth of Puerto Rico (discussed in *Cordova & Simonpietri Ins. Agency Inc.* v. *Chase Manhattan Bank N.A.*, 649 F.2d 36, 40-41 (1st Cir. 1981) (Breyer, J.), and *Mora*, 113 F. Supp. at 318). The memorandum stated that "Congress has agreed that Puerto Rico shall have, under [its] Constitution, freedom from control or interference by Congress in respect of internal government and administration, subject only to compliance with applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by judicial decision." *Ibid.* (quoted in *Cordova*, 649 F.2d at 41 n.28).

President Kennedy echoed this theme in a 1961 memorandum addressed to executive department and agency heads: "The Commonwealth structure, and its relationship to the United States which is in the nature of a compact, provide for self-government in respect of internal affairs and administration, subject only to applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act, and the acts of Congress authorizing and approving the constitution." Memorandum for the Heads of the Executive Departments and Agencies, 26 Fed. Reg. 6695 (July 25, 1961). This memorandum further noted that the United Nations had "recognized that the people of the Commonwealth of Puerto Rico, exercising effectively the right of self-determination in a free and democratic way, had achieved a new constitutional status." *Ibid.*

The President, Congress, and the people of Puerto Rico all agreed that the compact fundamentally changed the nature of the relationship between Puerto Rico and the United States. "Whereas the power of the United States exercised over Puerto Rico previously had been based upon the force of conquest from Spain, the new political status

of the island within the American system rests upon the consent of its people." Magruder, *supra*, at 9. Moreover, this new relationship had legal consequences: "Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States citizens." *Cordova*, 649 F.2d at 41 (Breyer, J.).

Puerto Rico's new status as a "commonwealth" created by "compact" with the United States not only changed the law governing the parties' relationship, but it also suggested a rough equality with the States. As this Court has noted, "the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Examining Bd. of Engineers, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 594 (1976); see also *Cordova*, 649 F.2d at 42 (noting the "general Congressional intent to grant Puerto Rico state-like autonomy"). "Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'" *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 8 (1982) (quoting *Calero-Toledo*, 416 U.S. at 673).

3. Under the compact, Puerto Rico ordinarily cannot be subject to greater federal statutory burdens than are applied to the States. The provisions of the Jones Act not superseded by the new Puerto Rican constitution became known as the PRFRA. See *Calero-Toledo*, 426 U.S. at 594. One such provision, codified at 48 U.S.C. § 734, states that "[t]he statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in

Puerto Rico as in the United States." A form of this provision has been in effect since the Foraker Act became law in 1900. See 31 Stat. 80 (§ 14 of the Foraker Act); 39 Stat. 954 (§ 9 of the Jones Act). Moreover, this Court has repeatedly cited Section 734 (or its predecessor provisions) in support of decisions applying federal statutes to Puerto Rico. See, *e.g.*, *American R.R. Co. of Porto Rico* v. *Didricksen*, 227 U.S. 145, 148-149 (1913) (Safety Appliance Act); *Kopel*, 211 U.S. at 473-476 (federal fugitive extradition statute); *Rodriguez* v. *United States*, 198 U.S. 156, 161-164 (1909) (federal statute governing composition of grand juries); *Crowley* v. *United States*, 194 U.S. 461, 467-469 (1904) (same); *cf. Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 499 (1988) (citing Section 734 to support the proposition that "the test for federal pre-emption of the law of Puerto Rico at issue here is the same as the test under the Supremacy Clause for pre-emption of the law of a State").

Section 734 provides a "default rule" of equal treatment for Puerto Rico, subject only to exceptions expressly provided by Congress. *Jusino Mercado* v. *Commonwealth of Puerto Rico*, 214 F.3d 34, 42 (1st Cir. 2000). By its terms, Section 734 requires that federal statutes be given "the same force and effect" in Puerto Rico as in the States, "except as hereinbefore or hereinafter otherwise provided." Thus, equal treatment is presumed, and if Congress wishes to treat Puerto Rico differently than the States under a particular federal statute, it must "otherwise provide[ ]."

The FLSA not only fails to state an exception to the "default rule" of equal treatment; it expressly states the opposite. The FLSA defines the term "State" to include territories such as Puerto Rico. See 29 U.S.C. § 203(c). Where Congress intended to treat Puerto Rico differently, it enacted specific provisions to produce that result. For example, the FLSA makes a special provision for "home workers" in Puerto Rico (see *id.* § 206(a)(2)); provides special review procedures in Puerto Rico (see *id.* § 210);

and exempts Puerto Rico from certain substantive provisions (see *id.* § 213(f)). Thus, it was Congress' practice in the FLSA to treat Puerto Rico like the States except in specific circumstances where it expressly provided for different treatment.

For present purposes, it is significant that Congress treated Puerto Rico like the States, recognizing that this Court had already acknowledged Puerto Rico's sovereign immunity. See *Sancho* v. *Yabucoa Sugar Co.*, 306 U.S. 505, 506 (1939) ("Porto Rico cannot be sued without its consent"); *Rosaly y Castillo*, 227 U.S. at 273 (Puerto Rico "come[s] within the general rule exempting a government sovereign in its attributes from being sued without its consent"); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation its enacts"). Thus, when this Court held in *Employees of the Department of Public Health & Welfare* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973), that the FLSA does not expose state agencies to private enforcement actions, Congress reasonably understood that holding to apply equally to Puerto Rico. And when Congress amended the statute in 1974 to authorize private enforcement actions against "public agencies" including the governments of the States and territories such as Puerto Rico, it reasonably believed that it was abrogating the sovereign immunity of the States *and* Puerto Rico. See *Molina-Estrada* v. *Puerto Rico Hwy. Auth.*, 680 F.2d 841, 846 (1st Cir. 1982) ("There is no language, history, or purpose related to this statute suggesting that Congress intended Puerto Rico to be treated any differently from a state for purposes of determining the application" of the term "public agencies"). As this Court later held, however, Congress was mistaken about its authority to abrogate sovereign immunity in the FLSA. See *Alden*, 527 U.S. at 754; *Seminole Tribe*, 517 U.S. at 72-73.

Petitioner's argument assumes that the same Congress that defined the term "State" to include territories actually intended to *distinguish* the States from the territories. But the Court of Appeals properly rejected this argument, based on the definition of "State" in the FLSA and Congress' clear statement in the PRFRA that Puerto Rico must be treated equally with the States insofar as federal statutes are concerned.

As the Court of Appeals explained, this Court's decisions in *Seminole Tribe* and *Alden* mean that employees of State governments cannot sue their employers for violations of the FLSA. Pet. App. 5a-6a. In other words, Section 16(b) of the FLSA has *no* "force [or] effect" in the States, and "[t]he only way to give section 16(b) 'the same force and effect in Puerto Rico as in the United States' is to hold, * * * that Puerto Rico likewise enjoys immunity from private FLSA enforcement suits." Pet. App. 8a.

4. Petitioner's challenges to the decision below are unconvincing. *First*, she says the purpose of Section 734 was merely to make federal statutes "applicable in Puerto Rico." Pet. at 10-12. But the statute does more than declare the simple applicability of federal law; it commands that federal statutes apply in Puerto Rico with "the *same* force and effect" as in the States. (Emphasis added.) By its plain terms, Section 734 requires *equal treatment* of Puerto Rico and the States. Petitioner would rewrite the statute to say that federal statutes have *some* force and effect in Puerto Rico, regardless of their force or effect in the United States.[2]

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[2] Although Congress has enacted provisions similar to Section 734 for other territories—expressly making federal law applicable in the territories—none of those provisions requires that federal law have "the same force and effect" in the territory as in the United States. This fact only confirms this Court's observation that "Puerto Rico occupies a relationship to the

Second, petitioner says Congress plainly intended to subject Puerto Rico to suit under Section 16(b) of the FLSA because it specifically defined "State" to include territories. See Pet. at 13-15. That much is true, but only that much. Indeed, Congress plainly intended to subject Puerto Rico *and* the States to suit under Section 16(b). But this Court has held that Congress *could not* subject the States to suit under Section 16(b), and the question now is whether Congress would intend to subject Puerto Rico to the burden of private enforcement suits *when the States are not subject to the same burden.* Both the FLSA's definition of "State" and Section 734 of the PRFRA answer that question: Congress intends all federal statutes, including the FLSA, to have "the same force and effect" in Puerto Rico as in the States, absent a specific mandate for disparate treatment.

The decision below gives full "force and effect" to the plain language of Section 734. That decision is fully consistent with the expressed intention of Congress to give equal treatment, so far as federal statutes are concerned, to Puerto Rico as to the States. Petitioner has offered no convincing reason to disturb the Court of Appeals' ruling, and for that reason alone the petition should be denied.

II. The Decision Below Does Not Conflict With This Court's Decisions In Any Way.

The decision below is also fully consistent with this Court's decisions.

1. Within thirteen years after the organization of Puerto Rico under the Foraker Act, this Court stated that "[i]t [was] not open to controversy" that Puerto Rico enjoyed that immunity from suit that is the characteristic of a sovereign government. *Rosaly y Castillo*, 227 U.S. at 273. By 1937, this Court characterized the Foraker Act

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United States that has no parallel in our history." *Examining Bd.*, 426 U.S. at 596.

and the Jones Act as legislation designed to give Puerto Rico "an autonomy similar to that of the states." *Shell Co.*, 302 U.S. at 261-262. And after Congress entered into the compact with Puerto Rico in 1952, this Court again noted that Congress' design in its relationship with Puerto Rico was "to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union." *Examining Bd.*, 426 U.S. at 594. These decisions reflect the unmistakable intention of Congress and the people of Puerto Rico, by their compact, to create a commonwealth that, "like a state, is an autonomous political entity, sovereign over matters not ruled by the Constitution." *Rodriguez*, 457 U.S. at 8 (quotations omitted).

The decision below thus comports with this Court's historic recognition of Puerto Rico's privileged position among American possessions. By giving full force and effect to the equal-treatment command in Section 734 of the PRFRA, the decision below treats Puerto Rico like a State for purposes of federal statutory law and ensures that Puerto Rico is not *disadvantaged* simply because of its unique status as a commonwealth.

2. Petitioner's contention that *Northern Insurance Co.* v. *Chatham County*, 126 S. Ct. 1689 (2006), requires a different result is unfounded. The Court in *Northern Insurance* held simply that a county government that was not an "arm of the State" for purposes of the Eleventh Amendment was not entitled to the State's immunity from suit in admiralty. See *id.* at 1695. *Northern Insurance* did not purport to address the issue decided by the Court of Appeals in this case, namely, the proper interpretation of the PRFRA. Moreover, in its examination of Eleventh Amendment immunity, *Northern Insurance* did not purport to address the sovereign immunity of Puerto Rico or other territories.

In short, the decision below does not conflict with *Northern Insurance* because *Northern Insurance* did not

address any of the issues actually decided by the Court of Appeals.

III. The Decision Below Does Not Conflict With Decisions From Other Circuits.

Nor does the decision below conflict with decisions in any other circuit. Petitioner concedes that the Court of Appeals "did not hold that Puerto Rico possesses Eleventh Amendment sovereign immunity." Pet. at 7. Indeed, the Court of Appeals rested its holding squarely on a plain-language interpretation of the FLSA and Section 734 of the PRFRA, not any examination of Puerto Rico's sovereign immunity *per se*. The decision below thus does not and cannot conflict with the decisions cited by petitioner, because those decisions address Eleventh Amendment immunity and do not purport to interpret the PRFRA.

1. That is true of the Ninth Circuit decisions cited by petitioner, which address the *constitutional* sovereign immunity of the Commonwealth of the Northern Mariana Islands ("CNMI"). In 1976, the Northern Mariana Islands and the United States entered into the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America. See Pub. L. No. 94-241, 90 Stat. 263 (1976). In *Fleming* v. *Department of Public Safety*, 837 F.2d 401 (9th Cir. 1988), the Ninth Circuit held that the CNMI had *waived* whatever immunity it had when it entered into the Covenant. *Id.* at 407. While the Covenant expressly adopted several provisions of the United States Constitution—including the first nine amendments, the Reconstruction amendments, and the Nineteenth and Twenty-Sixth Amendments—noticeably absent from this list is the Eleventh Amendment. This omission made all the difference to the court in *Fleming*: "That [the drafters of the Covenant] deliberately declined to include the eleventh amendment unequivocally demonstrates their desire that the Commonwealth not be afforded eleventh

amendment immunity." *Id.* at 405. The Ninth Circuit reaffirmed this holding in *Magana* v. *CNMI*, 107 F.3d 1436 (9th Cir. 1997), and again in *Norita* v. *CNMI*, 331 F.3d 690 (9th Cir. 2003).

In each case, then, the issue was whether the CNMI had Eleventh Amendment immunity from suit in federal court, and in each case the Ninth Circuit held that the CNMI had waived its immunity by virtue of the specific language of the Covenant. By contrast, the PRFRA does not contain the same list of incorporated constitutional provisions that is found in the CNMI Covenant, and there is no suggestion here that Puerto Rico waived its sovereign immunity.

Moreover, of critical importance here, the court below, unlike the Ninth Circuit in these two decisions, did not even address Puerto Rico's immunity as a constitutional matter; its decision rested *solely* on statutory grounds. Thus, there is no conflict between the decision below and the Ninth Circuit decisions cited by petitioner.

2. The First Circuit decisions cited by petitioner likewise address Eleventh Amendment immunity rather than the PRFRA. As petitioner recognizes, an unbroken line of decisions from the First Circuit holds that Puerto Rico is treated like a State for purposes of the Eleventh Amendment. See, *e.g.*, *Ezratty* v. *Commonwealth*, 648 F.2d 770, 777 n.7 (1st Cir. 1981) (Breyer, J.) ("The principles of the Eleventh Amendment, which protect a state from suit without its consent, are fully applicable to the Commonwealth of Puerto Rico"); *Ramirez* v. *Puerto Rico Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983) ("Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects"); *Metcalf & Eddy, Inc.* v. *Puerto Rico Aqueduct & Sewer Auth.*, 991 F.2d 935, 939 n.3 (1st Cir. 1993) ("We have consistently treated Puerto Rico as if it were a state for Eleventh Amendment purposes"); *Redondo Constr. Corp.* v. *Puerto Rico Hwy. & Transp. Auth.*, 357 F.3d 124, 125

n.1 (1st Cir. 2004) ("The Commonwealth of Puerto Rico is treated as a state for purposes of the Eleventh Amendment").

Clear as the First Circuit's position on the scope of constitutional protection for Puerto Rico, the Constitution was irrelevant to the analysis of the Court of Appeals here. The decision below rests on an interpretation of the PRFRA, not the Eleventh Amendment.

Moreover, by deciding the statutory question as it did, the court below *avoided* creating a conflict with the First Circuit. That court held in *Jusino Mercado* v. *Commonwealth of Puerto Rico*, 214 F.3d 34 (1st Cir. 2000), that Puerto Rico, like the States, is immune from private actions for damages under the FLSA. The plaintiff in *Jusino Mercado* made the same argument petitioner advances here—that this Court's decisions in *Seminole Tribe* and *Alden* distinguish Puerto Rico from the States with respect to sovereign immunity, so that even if Congress could not subject the States to suit under the FLSA, it could subject Puerto Rico to suit by the same statutory language. See *id.* at 37-39.

The First Circuit rejected this argument based on the text and structure of the FLSA, considered in conjunction with the policy of equal treatment expressed in the Federal Relations Act. The court first noted that "neither the language of the FLSA's enforcement provision nor the specific definitions provided by Congress suggest an intent to treat Puerto Rico and the states differently. To the contrary, Congress used the word 'state' in an encompassing sense, agglomerating the states and the territories." *Id.* at 42. Even when Congress amended the FLSA to authorize private actions against "public agencies," it did not make any attempt to distinguish Puerto Rico from the States. *Ibid.* "This is particularly significant," the First Circuit reasoned, "because other provisions of the FLSA show that when Congress intended to single out Puerto Rico, it knew how to do so." *Ibid.*

(citing provisions setting unique minimum wage requirements for "home workers" in Puerto Rico and establishing industry committees to set minimum wage rates for workers in Puerto Rico).

Most important, however, was the fact that "Congress wrote the FLSA's enforcement provision with full knowledge of Puerto Rico's unique commonwealth status." *Ibid.* Puerto Rico's unique status is reflected in the PRFRA, by which "Congress hoped 'to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union.'" *Ibid.* (quoting *Examining Bd.*, 426 U.S. at 594). Section 734 of the PRFRA demonstrated Congress' goal to grant Puerto Rico equal status, providing that federal statutes must have the same "force and effect" in Puerto Rico that they have in the States. "Thus, long before Congress enacted the relevant provision of the FLSA, it had put firmly in place a default rule: statutes of general application would apply equally to Puerto Rico and to the fifty States *unless* Congress made specific provision for differential treatment." *Ibid.*

Given this firm commitment to equal treatment for Puerto Rico, the First Circuit concluded that "courts will not ordinarily construe statutes to treat Puerto Rico in one way and the states in another unless the language of a particular statute demands that result." *Ibid.* The FLSA contains no express command to distinguish Puerto Rico from the States—indeed, it says the opposite—and the First Circuit found no compelling policy justification to do so. See 214 F.3d at 43. "[G]iven the language of the FLSA, the context in which Congress amended it to reach public agencies, and the guidance provided by the Federal Relations Act, reading the law to intrude more profoundly on Puerto Rico's sovereignty than on that of the states would contradict what we discern to be Congress's manifest intent." *Id.* at 44. Since the FLSA could not be

applied against the States, it could not be applied against Puerto Rico.[3]

Petitioner does not even cite *Jusino Mercado*—the only decision directly on point—despite the fact that the Court of Appeals expressly relied on that decision in interpreting the PRFRA. See Pet. App. 9a. This omission only highlights the futility of petitioner's attempt to create a circuit split where none exists.

* * * * *

The decision of the Court of Appeals vindicates the plain intention of Congress and the people of Puerto Rico to create a commonwealth that in many respects would be treated like a State. The decision below follows inexorably from the language of the FLSA—which defines "State" to include territories such as Puerto Rico—and the command of Section 734 of the PRFRA that federal statutes "shall have the same force and effect in Puerto Rico as in the United States." Neither the decisions of this Court nor the decisions of other courts of appeals suggest any error in the Court of Appeals' decision here. Further review is therefore unwarranted.

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[3] This result is consistent with the First Circuit's conclusion in *Molina-Estrada*, where then-Judge Breyer explained for a unanimous panel that "Congress, had it foreseen the *un*constitutionality of these words ['public agency'] (withdrawing their application to the states) would have intended withdrawal of their applicability *pro tanto* from Puerto Rico as well." 680 F.2d at 846. Thus, the court concluded, "as a matter of statutory construction, that the words 'public agency' no longer apply in Puerto Rico to the same extent that they no longer apply in the states." *Ibid.*

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

EMMA RODRIGUEZ,

Petitioner,

v.

PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, MARI CARMEN APONTE, MARCOS VILAR, MAIRYM RAMOS, & AIDA SANCHEZ,

Respondents,

UNITED STATES OF AMERICA,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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The sovereign immunity available to territories was last discussed by this Court in 1913 and has not been revisited since this Court's decisions in *Alden v. Maine*,[1] and *Seminole Tribe*.[2] Territorial sovereign immunity is one of the last remaining immunity questions to be resolved by this Court. The decision below granting Puerto Rico sovereign immunity from the federal Fair Labor Standards Act claims of a New York citizen conflicts with the other Circuits and conflicts with the clear language of the prior sovereign immunity decisions of this Court.

Point One: The Decision Below Incorrectly Found that the PRFRA Requires Puerto Rico Be Treated Equally to the State.

The decision below incorrectly grants Puerto Rico sovereign immunity to Congress's clear direction that it be liable for violations of the Fair Labor Standards Act (FLSA). Congress clearly intended Puerto Rico to be liable as an employer under the FLSA. 29 U.S.C. § 203(c); 207. Congress intended to abrogate any immunity Puerto Rico or the States might have in the FLSA. *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62, 75-76 (2000). Congress did not have the authority to abrogate State sovereign immunity with respect to private citizen suits because the States have a Constitutional sovereign immunity defense to private citizen suits.[3] *Alden, supra.* Puerto Rico does not have this Constitutional defense. Congress's express direction that

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1. *Alden v. Maine*, 527 U.S. 706, 755 (1999).

2. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996).

3. Congress had the authority to abrogate State sovereign immunity with respect to Secretary of Labor actions. *Alden, supra.*

Puerto Rico be liable if it violates the FLSA is Constitutionally authorized by the Territory Clause of the Constitution. U.S. Const., Art. IV, § 3, cl. 2.

The Court below granted Puerto Rico sovereign immunity to the same degree afforded the states under the Eleventh Amendment. Puerto Rico argues that this decision was correct and it should receive sovereign immunity to the same as the states because 1) Section 734 of the PRFRA "commands" equal treatment for Puerto Rico, and 2) the FLSA defines the word "State" to include territories. Both arguments involve substantial sophistry.

Section 734 cannot "command" equal treatment between Puerto Rico and the States because the Constitution treats territories and states differently and explicitly grants Congress authority to regulate Puerto Rico. U.S. Const., Art. IV, § 3, cl. 2. This Court has already held that Congress does not have to treat Puerto Rico equally. *Harris v. Rosario*, 446 U.S. 651, 651-2 (1980). Here, the rational basis for the different legislative impact of the FLSA is that the States have Eleventh Amendment immunity; Puerto Rico does not. Section 734 cannot and does not change Congress's Constitutional authority to regulate Puerto Rico.[4] Nothing

4. Puerto Rico maintains that § 734 "commands equal treatment and '[t]he only way to give section 16(b) 'the same force and effect in Puerto Rico as in the United States' is to hold, . . . that Puerto Rico likewise enjoys immunity from private FLSA enforcement suits.'" Opp. p. 4. By the word "likewise" Puerto Rico seeks to appropriate Eleventh Amendment sovereign immunity it cannot possess under the Constitution. Further, § 734 does not "command equal treatment" for Puerto Rico. Rather, it clearly says that federal statutes apply in Puerto Rico just as they do in the U.S., except as separately provided by (Cont'd)

in this Court's rulings suggest any such restriction on Congressional authority, by virtue of § 734, the Constitution or by virtue of any other source of law. *Id.*

Puerto Rico's argument is that Congress demonstrated a desire that Puerto Rico be treated identically to states within the FLSA itself, by lumping the territories into the definition of "state." 29 U.S.C. § 203(c). Therefore, Puerto Rico contends that when the States were held immune under the 11th Amendment, Congress meant the same Constitutional defense to apply to Puerto Rico.

There are several critical errors in this argument. First, the definition of states in the FLSA also includes the District of Columbia[5] and "possessions" as well as Territories.

(Cont'd)

Congress. This case arose in New York and the FLSA most assuredly applies in New York. Plaintiff is a New York citizen and the FLSA's application in Puerto Rico is not implicated in this case at all. There is also no doubt that the FLSA and 216(b) apply in New York. That Congress made the FLSA applicable to Puerto Rico as an employer also is clear. 29 U.S.C. § 203(c).

5. This Court has already held that:

> Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved. Indeed, such '(w)ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at, not only by a consideration of the words themselves, but by considering, as well the context, the purposes of the law, and the circumstances under which the words were employed.'

District of Columbia v. Carter, 409 U.S. 418, 420 (1973).

Clearly, the District of Columbia does not get state sovereign immunity to FLSA liability just because the States do. The Courts have not so found. *See, e.g., Brown v. Dist. of Columbia Bd. of Educ.*, No. 00-135 (D.D.C. February 17, 2005) (order granting FLSA judgment). There is no reason that Puerto Rico should obtain the benefit of constitutional sovereign immunity by the FLSA, anymore than it gets under the Constitution.[6] Second, the main problem with the ruling below is, as the District Court below found, that it requires reading Congressional intent to be exactly the opposite of what Congress said and did – which was to make Puerto Rico liable for violations of the FLSA. To find that Congress intended Puerto Rico to get the benefit of the State's Constitutional sovereign immunity requires "(i) speculation, (ii) about legislative intent, (iii) in the face of unambiguous statutory language requiring a different result." *Decision below, Rodriguez v. Puerto Rico Federal Affairs Admin.*, 338 F. Supp. 2d 125, 129 (D.D.C. 2004). Third, this Court has already declared in *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62, 75-76 (2000), that Congress meant to override sovereign immunity in creating a private right of action.

The decision below conflicts with this Court's finding that Congress has the Constitutional power to regulate Puerto Rico, that it may do so differently from the States, whenever it finds a "rational basis" for doing so, and in fact did so in the FLSA.

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6. Neither do other territories get state sovereign immunity. *Norita v. Commonwealth of the Northern Mariana Islands*, 331 F.3d 690 (9th Cir. 2003).

Point Two: The Decision Below Conflicts With This Court's Sovereign Immunity Rulings.

This Court has not addressed Territorial sovereign immunity directly since 1913. But the clear import of this Court's other sovereign immunity decisions is that, "only States and arms of the State possess immunity from suits authorized by federal law." *Northern Ins. Co. v. Chatham County*, 126 S. Ct. 1689 (2006). *See also Alden v. Maine, supra.* The D.C. Circuit's decision below directly contradicts this language. Puerto Rico claims there is no contradiction, but cannot explain how they can possibly be consistent.

Point Three: The Decision Below Conflicts with Other Circuits.

Similarly Puerto Rico denies that the decision below conflicts with the Ninth Circuit which found that the Commonwealth of the Northern Mariana Islands did not possess sovereign immunity to the FLSA, notwithstanding the very same Congressional provision, 29 U.S.C. § 216 was at issue there too. Puerto Rico attempts to harmonize the Ninth Circuit decisions by claiming that the Court there found that CNMI "waived" its sovereign immunity under its own particular "compact." But the Ninth Circuit decisions in *Fleming v. Department of Public Safety*, 837 F.2d 401, 405-6 (9th Cir. 1988) and *Norita v. Commonwealth of the Northern Mariana Islands*, 331 F.3d 690, 693 (9th Cir. 2003) simply are not "waiver" cases. The Ninth Circuit simply did not find that CNMI waived sovereign immunity it otherwise possessed.

Puerto Rico also denies that the decision below conflicts with the decisions of the First Circuit. However, that Circuit

locates sovereign immunity for Puerto Rico directly in the Eleventh Amendment. *Redondo-Borges v. U.S. Dept. of Housing and Urban Development*, 421 F.3d 1, 7 (1st Cir. 2005). Puerto Rico claims consistency with the First Circuit by citing to *Jusino Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34 (1st Cir. 2000) which found that Puerto Rico was not liable under the FLSA. That decision found Puerto Rico possessed sovereign immunity but apparently, not under the Eleventh Amendment. That decision is something of an anomaly in the First Circuit, however, as that Court has repeatedly, both before and after *Jusino Mercado*, found that Puerto Rico's immunity springs directly from the Eleventh Amendment. *See, e.g., Ramirez v. P.R. Fire Serv.*, 715 F.2d 694, 697 (1983); *Redondo-Borges v. U.S. Dept. of Housing and Urban Development*, 421 F.3d 1, 7 (1st Cir. 2005). Thus, the First Circuit has itself taken inconsistent approaches to Puerto Rico's immunity from federal statutory liability, however, the vast weight of decisions in that Circuit finds Puerto Rico possesses Eleventh Amendment sovereign immunity and the decision below conflicts with those decisions. Clearly the First, Ninth and D.C. Circuits have taken very different positions on what kind of immunity Puerto Rico possesses.

Point Four: Territorial Sovereign Immunity is An Important Question that Only This Court Can Resolve.

Puerto Rico argues that Congress does not have the power to abrogate its immunity. Opp. p. 10. Puerto Rico argues that it is only subject to the Constitution and the PRFRA. Opp. p. 10. This assertion of authority flies in the face of this Court's pronouncements. *Harris v. Rosario*, 446 U.S. 651, 651-2 (1980). Puerto Rico's attempt to secure

freedom from Congressional oversight is contrary to the Territory Clause, U.S. Const., Art. IV, § 3, cl. 2, and finds no support in this Court's sovereign immunity jurisprudence. *Northern Ins. Co. v. Chatham County*, 126 S. Ct. 1689 (2006). Congress intended to abrogate Puerto Rico's immunity from private actions. *Kimmel v. Florida Bd. of Regents*, 528 U.S. 62, 75-76 (2000). Congress had that power.[7] U.S. Const., Art. IV, § 3, cl. 2. Congress's express intent has been frustrated by the decision below, incorporating the State's sovereign immunity to Puerto Rico under the guise of § 734.

The differing positions in the Circuits places Congress in an untenable bind, which Puerto Rico cannot dispute and must enjoy. Under the D.C. Circuit's analysis, Congress would be required to undertake a statute by statute review of which statutes should apply to Puerto Rico, but by the First Circuit's analysis, any such specification is entirely beyond Congress's power. As long as this limbo can last, Puerto Rico benefits, and its citizens and employees suffer from the lack of clarity that only this Court can remedy.

Congress, Puerto Rico, the other territories, and any person or entity dealing with any territory has a strong interest in knowing exactly what immunity the territories do or do not possess. At this point, only this Court can answer this question.

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7. "Congress, . . . is empowered under the Territory Clause of the Constitution, U.S.Const., Art. IV, § 3, cl. 2, to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,' [and] may treat Puerto Rico differently from States so long as there is a rational basis for its actions." *Harris v. Rosario*, 446 U.S. 651, 651-2 (1980).

CONCLUSION

The Court of Appeals' decision below is wrong, conflicts with decisions in the Ninth and First Circuits, and conflicts with this Court's recent pronouncements in *Northern Insurance Company of New York, supra.* This Petition for Certiorari should be granted so that this Court can resolve the confusion in the circuits on the important question of the nature and extent of territorial sovereign immunity.

Respectfully submitted,

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